

NOV 08 2005

REMARKS

Claims 24, 43 and 45-52 and 54-56 were pending and stood rejected. Applicants respectfully submit that claim 24, 43 and 45-52 and 54-56 are allowable.

Claims Rejection - Double Patenting

Claims 24, 43, 45-52 and 54-56 were rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of U.S. Patent No. 5,489,307 (the "307 patent"). Further, claims 24, 43, 45-48 and 54-56 were rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of U.S. Patent No. 5,700,291 (the "291 patent"). Although Applicants do not concede that the non-canceled claims are unpatentable over the claims of the '307 and '291 patents, Applicants will obviate the rejection by submitting a terminal disclaimer when allowable subject matters are indicated for all remaining claims.

Because claim 24 is only rejected under obviousness-type double patenting, and because a terminal disclaimer has been filed herewith, Applicants respectfully request a notice of allowance for this claim. In addition, dependent claims 49-52 and 56 depend directly or indirectly on independent claim 24 and are also in condition for allowance.

Claim Rejections - 35 U.S.C. §§ 102 and 103(a)

Claims 43 and 45-48 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Michelson's U.S. Patent No. 5,484,437 (Michelson) in view of Jacobson's U.S. Patent No. 4,545,374 (Jacobson). The Examiner states that the use of a cannula was well known in the art as seen from Jacobson. The Examiner further argues that a cannula would have been obvious from the devices used by Michelson and that the forward projecting nipple 260 of Michelson serves as a guide pin with the drill portion 250 working in conjunction with sleeves 140 and 242. *See* FIGS. 11A and 11C; column 23, lines 1-9.

Applicants do not dispute that "the use of a cannula was well known in the art." Office Action, at 3. However, the fact that the use of a cannula in surgical procedures was known does not render the present invention obvious in light of Michelson. Michelson does not teach, suggest, or disclose, alone or in combination with Jacobson, the remaining elements of claim 43.

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Michelson teaches distracting adjacent vertebrae as the initial step in performing diskectomy. Michelson states:

“...two distractors are used to separate two adjacent vertebrae to a preferred distance. A hollow Outer Sleeve having teeth at one end is driven into the adjacent vertebrae on one side to hold the vertebrae in position...” Col. 8, lines 5-9.

“7. The present invention holds the vertebrae to be fused distracted throughout the procedure.”

Col. 8, lines 52-53. Moreover, “the Outer Sleeve 140, working in conjunction with the Short Distractor 120, on the contralateral side rigidly maintains the relative position of the adjacent vertebrae V.” Col. 21, lines 31-33. Further, “the Outer Sleeve 140 . . . is firmly embedded into the adjacent vertebrae V.” Col. 21, lines 39-40. “Nipple 260 is distracting, stabilizing as it resists any tendency of the vertebrae to move together, is self-centering to the Drill portion 250 when working in conjunction with Sleeves 140 and 242, and virtually assures the symmetrical resection of bone from the opposed vertebral surfaces.” Col. 23, lines 1-9. Thus, in accordance with the method disclosed in Michelson, and referring to FIGS. 11A and 11C, adjacent vertebrae are first separated using distractors and then held in place throughout the procedure by engagement means (i.e., teeth) 251 at the distal end of cannula (i.e., hollow Outer Sleeve) 140. Nipple 260 only stabilizes the vertebrae as the drill resects the opposed vertebral surfaces.

In contrast, claim 43 does not recite predistracton of the vertebrae. Claim 43, rather, recites

“...selecting a boring tool having a guide pin on a distal end thereof and a cutting portion proximal to the guide pin, said guide pin having a radial dimension sized to approximate a desired distraction of said disk space and smaller than a radial dimension of the cutting portion of said tool at said distal end, said guide pin attached to said boring tool for

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movement therewith and prevented from movement independent from said boring tool."

Applicants' method enables the separation of adjacent vertebrae during the boring process and distracts the vertebrae when boring into the disk space.

In addition, claim 43 recites that the "guide pin [is] attached to said boring tool for movement therewith and prevented from movement independent from said boring tool." Michelson does not teach, suggest or disclose the Nipple 260 being attached to the boring tool such that it is "prevented from independent movement."

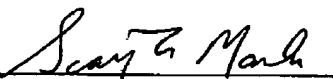
For at least these reasons, Applicants believe that independent claim 43, as previously presented, is not obvious in light of the cited references. Claims 45-48, being ultimately dependent on claim 43, are also not obvious.

Therefore, subject to the aforementioned terminal disclaimer, Applicants believe claims 24, 43, 45-52 and 54-56 are in condition for allowance. In view thereof, Applicants respectfully request that the rejections be reconsidered and withdrawn, and the application approved for allowance.

Respectfully Submitted,

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Dated: November 8, 2005

M2:20753371.02